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No. 06 - 223

In the
Supreme Court of the United States
October Term, 2006

JOHN DREBICK *et ux.* d/b/a DREBICK INVESTMENTS,
Petitioners,
v.
CITY OF OLYMPIA,
Respondent.

On Petition for Writ of *Certiorari*
to the Washington Supreme Court

BRIEF OF *AMICI CURIÆ* NEW ENGLAND LEGAL FOUNDATION, ATLANTIC LEGAL FOUNDATION, AND GREATER BOSTON REAL ESTATE BOARD IN SUPPORT OF PETITIONERS

Counsel for Amici Curiæ

MICHAEL E. MALAMUT
Counsel of Record
Martin J. Newhouse
New England Legal Foundation
150 Lincoln Street
Boston, MA 02111
Tel.: (617) 695-3660
Fax: (617) 695-3656
michaelmalamut@nelfonline.org

MARTIN S. KAUFMAN
Atlantic Legal Foundation
150 East 42nd Street
New York, NY 10017
Tel.: (212) 573-1960
Fax: (212) 857-3653
mskaufman@yahoo.com

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MOTION OF *AMICI CURIÆ* NEW ENGLAND LEGAL FOUNDATION, ATLANTIC LEGAL FOUNDATION, AND GREATER BOSTON REAL ESTATE BOARD FOR LEAVE TO FILE BRIEF IN SUPPORT OF PETITIONERS

Counsel for Amici Curiæ

MICHAEL E. MALAMUT
Counsel of Record
Martin J. Newhouse
New England Legal Foundation
150 Lincoln Street
Boston, MA 02111
Tel.: (617) 695-3660
Fax: (617) 695-3656
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Fax: (212) 857-3653
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Pursuant to Supreme Court Rule 37.2, counsel for *Amici Curiae* have attempted to secure written consent for the filing of the attached *Amicus Curiae* Brief from counsel for the Petitioner and Respondent. Counsel for Petitioner granted such consent and its assent accompanies this motion and brief. Counsel for *Amici* requested assent from counsel for Respondent on September 8, 2006. Counsel for Respondent withheld such assent in a letter that accompanies this Motion and Brief. Accordingly, *Amici Curiae* hereby move this Court for leave to file the Brief of *Amici Curiae* which is submitted herewith. *Amici* make this motion on the following grounds:

NELF is a non-profit, public interest law firm, incorporated in Massachusetts in 1977. It is headquartered in Boston. Its membership consists of corporations, law firms, individuals, and others who believe in NELF's mission of promoting balanced economic growth for the United States and the New England region, protecting the free enterprise system, and defending economic rights. NELF's more than 130 members and supporters include a cross-section of large and small corporations, primarily from New England.

NELF's members are affected by the real estate development climate in New England, which depends, in part, upon the extent to which development is hampered by fees that bear no relationship to any adverse impact of the development. Furthermore, some of NELF's members are directly interested in real estate development because they own, finance, develop, and manage real estate. For those reasons, NELF's members are concerned about the issues presented this case.

NELF has regularly appeared in state and federal courts, as party or counsel, in cases raising issues of general economic significance to the New England and national business communities. *See, e.g., Rapanos v. United States*, 126 S.

Ct. 2208 (2006); *S.D. Warren Co. v. Maine Bd. of Envtl. Protection*, 126 S. Ct. 1843 (2006); *Kelo v. City of New London*, 125 S. Ct. 2655 (2005); *San Remo Hotel, L.P. v. City of San Francisco*, 545 U.S. 323 (2005); *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280 (2005); *Commissioner v. Banks*, 125 S. Ct. 826 (2005); *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003); *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000).

Atlantic Legal Foundation ("Atlantic Legal") is a nonprofit public interest law firm whose mandate is to advocate and protect the principles of limited government, the free-market system, and individual rights. One of Atlantic Legal Foundation's abiding concerns has been the protection of property rights. Atlantic Legal has represented property owners in New York in a successful federal court case challenging the constitutionality of the New York Eminent Domain Procedure Law and before this Court has represented associations of small property owners located throughout the United States as *amici* in cases involving regulatory takings and the application of this Court's teachings regarding exactions in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374 (1994). *See, e.g., Tahoe-Sierra Pre. Council v. Tahoe Envtl. Planning Agency*, 535 U.S. 302 (2002).

The Greater Boston Real Estate Board, founded in 1889, is the oldest Real Estate Trade Association in America. Comprised of almost 8,000 members, it consists of 5 divisions which are involved in developing, managing, buying, selling, leasing and financing real estate development projects. The organizations membership is diverse, comprised of large publicly traded companies, some of which are the largest national producers of commercial and residential rental, and for sale properties. The Real Estate Board's mission is to be a

strong advocate for private property interests, and advance practical and productive land uses policy initiatives in Massachusetts, and New England.

Amici believe that "impact fees" which are not proportional to the actual public burden resulting from the proposed development do not advance a legitimate public purpose, but instead are often a means of raising government revenue so as to offset declining contributions from state and federal sources. As such, they replace generally applicable taxes, and unfairly burden a particular, relatively narrow, segment of the general public.

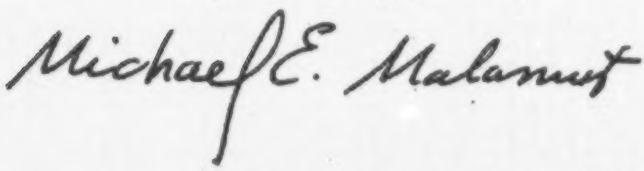
Amici Curiæ therefore believe that this Brief provides an additional perspective, which may aid the Court in determining whether to grant the petition for a writ of *certiorari* of the petitioners, John Drebick *et ux.*, d/b/a Drebick Investments ("Drebick").

Wherefore, *Amici* respectfully request that this Court grant *Amici Curiae* leave to file the attached brief in support of the Petition for a Writ of *Certiorari.*

Respectfully submitted,

NEW ENGLAND LEGAL FOUNDATION,
ATLANTIC LEGAL FOUNDATION, and
GREATER BOSTON REAL ESTATE BOARD

By its attorneys,



Michael E. Malamut, *Counsel of Record*
Martin J. Newhouse
New England Legal Foundation
150 Lincoln Street
Boston, MA 02111-2504
Telephone: (617) 695-3660
Facsimile: (617) 695-3656
michaelmalamut@nelfonline.org

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Atlantic Legal Foundation
150 East 42nd Street
New York, NY 10017
Telephone: (212) 573-1960
Facsimile: (212) 857-3653
mskaufman@yahoo.com

Dated: Sept. 13, 2006

QUESTIONS PRESENTED

Amici Curiæ New England Legal Foundation ("NELF") and Atlantic Legal Foundation ("Atlantic Legal") adopt the statement of questions presented contained in the Brief of Plaintiffs-Petitioners John Drebick *et ux.*, d/b/a Drebick Investments ("Drebick"), as follows:

1. May a local government avoid the "nexus" and "rough proportionality" tests of *Nollan v. California Coastal Commission,* 483 U.S. 825 (1987), and *Dolan v. City of Tigard,* 512 U.S. 374 (1994), by imposing development exactions in the form of "impact" fees?

2. May a local government avoid the "nexus" and "rough proportionality" tests of *Nollan v. California Coastal Commission,* 483 U.S. 825 (1987), and *Dolan v. City of Tigard,* 512 U.S. 374 (1994), by imposing development exactions by legislative enactment?

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INTEREST OF *AMICI CURIÆ*

Amici seek to bring to the Court's attention their views, and those of their supporters, concerning the scope of the takings clause under the Fifth and Fourteenth Amendments to the United States Constitution.[1]

NELF is a non-profit, public interest law firm, incorporated in Massachusetts in 1977. It is headquartered in Boston. Its membership consists of corporations, law firms,

1 Pursuant to Supreme Court Rule 37.6, counsel for *Amici* state that neither counsel for Petitioners nor Respondent authored this Brief in whole or in part and no person or entity other than *Amici* made a monetary contribution to the preparation or submission of the brief.

individuals, and others who believe in NELF's mission of promoting balanced economic growth for the United States and the New England region, protecting the free enterprise system, and defending economic rights. NELF's more than 130 members and supporters include a cross-section of large and small corporations, primarily from New England.

NELF's members are affected by the real estate development climate in New England, which depends, in part, upon the extent to which development is hampered by fees that bear no relationship to any adverse impact of the development. Furthermore, some of NELF's members are directly interested in real estate development because they own, finance, develop, and manage real estate. For those reasons, NELF's members are concerned about the issues presented this case.

NELF has regularly appeared in state and federal courts, as party or counsel, in cases raising issues of general economic significance to the New England and national business communities. *See, e.g., Rapanos v. United States,* 126 S. Ct. 2208 (2006); *S.D. Warren Co. v. Maine Bd. of Envtl. Protection,* 126 S. Ct. 1843 (2006); *Kelo v. City of New London,* 125 S. Ct. 2655 (2005); *San Remo Hotel, L.P. v. City of San Francisco,* 545 U.S. 323 (2005); *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.,* 544 U.S. 280 (2005); *Commissioner v. Banks,* 125 S. Ct. 826 (2005); *Green Tree Fin. Corp. v. Bazzle,* 539 U.S. 444 (2003); *EEOC v. Waffle House, Inc.,* 534 U.S. 279 (2002); *Palazzolo v. Rhode Island,* 533 U.S. 606 (2001); *Crosby v. National Foreign Trade Council,* 530 U.S. 363 (2000).

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free-market system, and individual rights. One of Atlantic Legal Foundation's abiding concerns has been the protection of property rights. Atlantic Legal has represented property owners in New York in a successful federal court case challenging the constitutionality of the New York Eminent Domain Procedure Law and before this Court has represented associations of small property owners located throughout the United States as *amici* in cases involving regulatory takings and the application of this Court's teachings regarding exactions in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374 (1994). *See, e.g., Tahoe-Sierra Pre. Council v. Tahoe Envtl. Planning Agency*, 535 U.S. 302 (2002).

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segment of the general public.

Amici Curiæ therefore believe that this Brief provides an additional perspective, which may aid the Court in determining whether to grant the petition for a writ of *certiorari* of the petitioners, John Drebick *et ux.*, d/b/a Drebick Investments ("Drebick"). Pursuant to Supreme Court Rule 37.2 (b), counsel for *Amici* have bound a motion for leave to file this Brief together with the Brief, as counsel for Respondent have withheld consent for the filing of this Brief.

STATEMENT OF THE CASE

Amici adopt the Statement of the Case contained in the Brief of the Petitioners.

SUMMARY OF ARGUMENT

The Washington Supreme Court erroneously concluded that it could uphold a traffic impact fee that applied uniformly throughout the City of Olympia. This Court should grant the petition for certiorari because the decision below failed to apply *Dolan v. City of Tigard*, 512 U.S. 374, 386 (1994), since the fee was imposed based on the generalized transportation infrastructure needs of a city-wide "service area," rather than the actual adverse transportation impact of the Drebicks' proposal. The decision below deprives the *Dolan* standard of meaning and conflicts with the decisions of other state and federal courts. Moreover, the issue before this Court is not an isolated instance. To the contrary, numerous jurisdictions apply disproportionate exactions with their inherently unfair impact, despite court decisions that have addressed disproportionate impacts clearly and directly.

ARGUMENT

I. Rough proportionality is the touchstone in analyzing government requirements that penalize property owners for engaging in permitted development.

Amici respectfully submit that the application by Respondent City of Olympia ("Olympia") of a traffic impact fee that bears no relationship to the actual traffic impact of the proposed development violates the Takings Clause of the Fifth Amendment to the United States Constitution (as applicable through the Due Process Clause of the Fourteenth Amendment).

The hearings examiner who considered Drebicks' application to build an office building determined that under the Olympia scheme, "'the transportation impact fee assessed [on] a specific development *is used for improvements that will reasonably benefit that development, if benefit is judged by the effect of the transportation improvements in the jurisdiction as a whole.*'" *City of Olympia v. Drebick*, 156 Wash. 2d 289, 305, 126 P.3d 802, 809 (2006), Appendix ("App.") at A-15 (emphasis in citation). *See* App. at E-14, ¶ 34 (hearing examiner's decision). The hearings examiner found, however, that "[e]ven if each of the City's criticisms is accepted, the independent fee calculation [presented by the Drebicks] shows that the Drebick proposal will contribute a miniscule amount of traffic to some of the projects funded by impact fees . . . ." App. at E-15, ¶ 38. The examiner therefore invalidated the $132,328.98 impact fee, as applied to the Drebicks, for failure to take into account the individualized traffic impact of their proposal. App. at E-55.

The hearings examiner's decision was reversed by the Superior Court, App. D, which was in turn reversed by the Court of Appeals (upholding the hearings examiner and

requiring an individualized impact assessment), *City of Olympia v. Drebick*, 119 Wash. App. 774, 83 P.3d 443 (2004), App. C. In a 6–3 split decision, the Washington Supreme Court reversed the Court of Appeals and reinstated the nonproportional impact fee. 156 Wash. 2d 289, 126 P.3d 802, App. A.

The Washington Supreme Court upheld the Olympia traffic impact fee based on the square footage of the Drebicks' proposed new building as commercial space and not on its individualized traffic impact, in part because the fee was "legislative" rather than "adjudicative." *City of Olympia*, 156 Wash. 2d at 293, 126 P.3d 803, App. at A-2. The principal argument of the Washington Supreme Court majority, however, was that exactions analysis under *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994), involves only mandated land dedications, and does not apply to impact fees. *City of Olympia*, 156 Wash. 2d at 302, 126 P.3d 808, App. at A-11–12.

Amici contend that an impact fee, such as the traffic fee in this case, that fails to advance its stated goals of alleviating adverse traffic effects of the proposed project, constitutes a regulatory taking under the standards of *Nollan*, 483 U.S. at 834, and *Dolan*, 512 U.S. at 386. Undoubtedly, minimizing traffic impact is a legitimate government purpose. Unless a regulatory land-use exaction (such as a one-time traffic impact fee imposed as a condition for property development) substantially advances its legitimate government purpose the "restriction is not a valid regulation of land use but 'an out-an-out plan of extortion.'" *Nollan*, 483 U.S. at 837 (quoting *J.E.D. Assocs. v. Atkinson*, 121 N.H. 581, 584, 432 A.2d 12, 14–15 (1981)).

In order to advance a legitimate government purpose, a

government imposition on property development must bear some relationship to the public burden caused by the proposed development. In *Dolan*, this Court described the required nexus between a legitimate state interest and the government regulation intended to advance that interest as "rough proportionality." *Id.*, 512 U.S. at 386.

> We think a term such as "rough proportionality" best encapsulates what we hold to be the requirement of the Fifth Amendment. No precise mathematical calculation is required, but the city must make some sort of individualized determination that the [governmental] require[ment] . . . is related both in nature *and extent* to the impact of the [situation giving rise to the desired regulation].
>
> . . .
>
> [T]he city must make some effort to quantify its findings in support of the [regulation] beyond [a] conclusory statement.

Id., 512 U.S. at 391, 395–96 (emphasis added).

Despite the decision of the state supreme court majority below, this case fits easily within the analytical framework of *Nollan* and *Dolan*. The payment of a traffic impact fee is a prerequisite to Olympia's approval of the Drebicks' proposed new building on its property. The minority opinion clearly points out the strong precedents for applying *Nollan/Dolan* exaction analysis to impact fees as well as mandated land dedications. *City of Olympia*, 156 Wash. 2d at 321 & n.14, 126 P.3d at 817; App. at A-35–36 (Sanders, J. dissenting). The dissent further points out that a city-wide monetary imposition on development, made without reference to the impact of the

specific project cannot withstand Takings Clause analysis. *City of Olympia*, 156 Wash. 2d at 319–21, 126 P.3d at 816–18, App. at A-33–36 (Sanders, J. dissenting).

The Washington Supreme Court majority ignores the growing number of courts that have recognized that the property protections enunciated in *Nollan* and *Dolan* would be easily overcome if monetary exactions are exempt from exactions analysis. *See Town of Flower Mound v. Stafford Estates, L.P.*, 135 S.W.3d 620, 639–40 (Tex. 2004) (applying *Nollan* and *Dolan* to impact fees); J. David Breemer, *The Evolution of the "Essential Nexus": How State and Federal Courts Have Applied Nollan and Dolan and Where They Should Go From Here*, 59 Wash. & Lee L. Rev. 373, 390 (2002) (noting "growing recognition that the logic of *Nollan* and *Dolan*" applies to impact fees); Ronald H. Rosenberg, *The Changing Culture of American Land Use Regulation: Paying for Growth with Impact Fees*, 59 SMU L. Rev. 177, 257–59 (2006). Sufficiently high fees could prohibit all "unwanted" development, or could be used to finance the type of "insufficiently related" physical takings invalidated in *Nollan* (beach access) and *Dolan* (dedicated bicycle path).

Both *Nollan* and *Dolan* require a legitimate public purpose and rough proportionality to insure just compensation for regulatory takings under the Takings Clause. A non-proportional development exaction, no matter in what form it is imposed, takes money or property value from a property developer in exchange for government permission to do what the developer is entitled to do—develop his or her property. *See* Carlos A. Ball & Laurie Reynolds, *Exactions and Burden Distribution in Takings Law*, 47 Wm. & Mary L. Rev. 1513, 1520 (2006) ("[W]hether the requirement be that a landowner dedicate an acre of land or pay an amount of money that

equals the cost of an acre of land, the ultimate impact on her is similar."). Such an exaction impermissibly imposes on the individual property developer a burden (*e.g.*, a fee used to improve traffic flow in the municipality generally) that should be borne by society as a whole. *Armstrong v. United States*, 364 U.S. 40, 49 (1960). A proportional exaction, on the other hand, compensates the government for an adverse impact of a property owner's development. A non-proportional fee simply penalizes a developer for exercising his or her development rights and thus constitutes an uncompensated taking of property.

The Washington Supreme Court majority below fails to address this Court's concerns with exactions as regulatory takings. This Court has applied a regulatory takings analysis when a condition for a building permit creates a "heightened risk that the purpose is avoidance of the compensation requirement, rather than the stated police power objective." *Nollan*, 483 U.S. at 841. A property owner should be essentially indifferent as between a mandated physical dedication that reduces the value of his or her property and a disproportionate or unrelated impact fee in an equal amount. *See* Inna Reznik, Comment, *The Distinction Between Legislative and Adjudicative Decisions in* Dolan v. City of Tigard, 75 N.Y.U. L. Rev. 242, 274–75 (2000).

The attempted distinction between impact fees and physical exactions drawn by the court below is erroneous because, under *Nollan*, heightened scrutiny applies whenever the government demands a concession as "a condition to the lifting of a land-use restriction." *Nollan*, 483 U.S. at 841. The decision of the Washington Supreme Court below explicitly contradicts the mandate of this Court in *Nollan* and *Dolan* and

therefore merits review and correction.

II. Repeated attempts by local governments to impose disproportionate impact fees in direct conflict with the takings jurisprudence of this Court and lower courts warrants granting *certiorari* in this case.

Pursuant to Supreme Court Rule 10 (b), *certiorari* is appropriate in this case because the decision of the Washington Supreme Court below conflicts with those of other state courts of last resort and federal Courts of Appeals as detailed in the Drebicks' Petition at 8–22. This Court, over dissent, declined to address the application of exactions analysis to impact fees in *Parking Association of Georgia v. City of Atlanta*, 515 U.S. 1116 (1995) (Thomas, J., joined by O'Connor, J., dissenting). Since that time, a number of additional jurisdictions have issued decisions that take differing positions, making a grant of *certiorari* by this Court more significant in resolving an open question of constitutional law. *See Town of Flower Mound*, 135 S.W.3d at 636–37 (reviewing decisions in various states).

In addition, *certiorari* is warranted pursuant to Supreme Court Rule 10 (c) as this case raises an important constitutional issue that this Court should address. Despite the guidance of this Court and lower courts to the contrary, as discussed above, numerous municipalities across the country continue to pass new and higher impact fees that bear no relation to a building project's actual impact. The pressure for lower courts to concede the legitimacy of such action is significant absent clear direction from this Court.

The temptation for municipalities to enact impact fees is understandable. Impact fees provide a way for municipalities to pay for services at a time of decreasing federal and state assistance and strong anti-tax sentiment. Noreen A. Murphy,

Note, *The Viability of Impact Fees after* Nollan *and* Dolan, 31 New Eng. L. Rev. 320, 213–15 (1996). At the same time, impact fees inevitably discourage development, playing to anti-growth sentiment. *Id.* Moreover, developers may have little incentive to challenge impact fees, even when those fees may be constitutionally invalid, because they often can pass them through to the ultimate buyer of the improved property, increasing the cost of all forms of property, including housing.

Although it acknowledged the municipality's "realpolitik" desire to maximize income, the United States Court of Appeals for the First Circuit, referring to *Dolan*, deemed improper a generally applicable impact fee because the "amount bore no relation to the capital expenditures for which [the municipality] could impose [an impact fee] requirement . . . ." *City of Portsmouth v. Schlesinger*, 57 F.3d 12, 17 (1st Cir. 1995). Despite (1) the applicability of *City of Portsmouth* to Massachusetts as a jurisdiction within the First Circuit and (2) voices decrying constitutional problems with non-proportional impact fees, the City of Boston recently raised its "h sing and employment exaction requirements" (also called "linkage fees"). *See* 2001 Mass. Stat. c. 170; 1987 Mass. Stat. c. 371, § 3; *South Boston Betterment Trust v. Boston Redev. Auth.*, 438 Mass. 57 (2002); Stephanie Ebbert, *Council OK's Hike in Linkage*, Boston Globe, Oct. 18, 2001, at B2; Stephanie Ebbert, *Senator Faults Menino's Proposal to Raise Linkage Fees*, Boston Globe, May 15, 2001, at B2 (questioning constitutionality of linkage fees); Editorial, *Menino Finds Ways to Shift City Costs*, Boston Herald, Feb. 18, 2006, at O16 (arguing that increasing linkage fees will "kill this little boomlet [of decreasing vacancy rates] in the cradle"); Anthony Flint, *Doubling of Linkage Fees Faces Scrutiny*, Boston Globe, Sept. 9, 2002, at B1. Numerous other New England municipalities, with or without state statutory

authorization, have likewise adopted non-proportional impact fees. *See Business Roundup*, Providence Journal, Nov. 12, 2005, at B-01 (holding impact fees partly responsible for decline in new housing starts statewide); Fergus Cullen, Op-ed, *Local Planning Boards Choke Growth by Trampling Rights*, Union Leader (Manchester, N.H.), Mar. 1, 2006, at A12 (criticizing impact fees and other planning board tactics for decreasing growth rates); *Ellsworth Panel Reviews Impact Fees*, Bangor Daily News (Me.), Jan. 27, 2005, at B3 (impact fees criticized as "a moratorium against the small guy"); *Parking Impact Fees Target of Petition*, Union Leader (Manchester, N.H.) Sept. 24, 2005, at B1; *Tufts Outreach*, Boston Globe, Oct. 10, 2004 (describing linkage fees in Somerville, Massachusetts, and describing a proposal for a fifty percent increase). Similar to the exactions in this case, many of these "linkage" and impact fees are assessed based on the square footage of the proposed project without regard to actual impact. *See* 2001 Mass. Stat. c. 170, § 4; Flint, *supra*.

In addition, a number of New England states have adopted impact fee statutes similar to the one involved in this case (Wash. Rev. Code § 82.02.050 (3)) that appear, at least superficially, to enforce *Nollan* and *Dolan* by requiring impact fees to be "reasonably related" to the development's share of needed infrastructure improvements. *See* Me. Rev. Stat. tit. 30–A, § 4354; N.H. Rev. Stat. § 674:21; R.I. Gen. Laws § 45–22.4. *See also* Vt. Stat. tit. 24, § 5203 (a) (2) (requiring "reasonable formula" for assessing impact fees). If the state courts in these states follow the lead of the Washington Supreme Court, *City of Olympia*, 156 Wash. 2d at 295–301, 126 P.3d at 804–07, App. at A-4–11, these statutes could be similarly interpreted as permitting generalized impact fees with no relation to the impact of the specific development, contrary to the mandates of *Nollan* and *Dolan*.

In the Mid-Atlantic region, Maryland stands out as imposing particularly high, and grossly uneven, impact fees. Four counties in Maryland—Charles, Frederick, Montgomery and Prince Georges—have impact fees for new construction single family residences that exceed $15,000. *See* Duncan Associates, 2006 National Impact Fee Survey, available at http://www.impactfee.com/2006survey.pdf. These are among the highest in the nation, outstripped only by about two dozen counties in California, and a few in Colorado, and one or two in each of Florida and Oregon. The average impact fee in Maryland is second only to that in California according to a national survey of impact fees. *Id.*

Given the seductive lure of raising funds for needed capital projects without direct costs to taxpayers, municipalities have significant incentives to impose non-proportional impact fees on developers. This tendency can only be reined in by guidance from this Court as to the appropriate circumstances for the imposition of impact fees and the method of determining their proportionality to the alleged harm. *See, e.g.*, Ball & Reynolds, 47 Wm. & Mary L. Rev. at 1513,[2] 1520.[3] *See also*

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2 In the last several decades, there has been a marked shift in local government financing away from the use of general revenue taxes and toward nontax revenue-raising devices such as exactions.

Id. at 1513.

3 The creativity shown by local governments in devising narrow, targeted, nontax finance devices has far outstripped the willingness of state courts to restore principled, limited parameters for those devices.

Id. at 1520.

Rosenberg, 59 SMU L. Rev. at 181,[4] 207,[5] 262.[6] This Court should grant *certiorari* because of the ease with which municipalities can raise funds through impact fees and the practical disincentives for developers to challenge such assessments, despite the fact that non-proportional impact fees stymie development and unfairly condition use of an owner's land. This Court's determination could deter the severe economic distortions caused by non-proportional impact fees in

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4 Increasingly, local governments combine their traditional land use regulatory powers with their authority to impose land development conditions. This practice has become known as requiring "exactions" as a condition of land use approval, often demanding an array of developer on-site and off-site improvements, land dedications, and cash payments made to the locality.

Id. at 181 (footnote omitted)

5 In 2000, the General Accounting Office (GAO) surveyed local governments and discovered high rates of impact fees use. The study found 59.4% or 564 cities with populations in excess of 25,000 and 39% or 238 metropolitan area counties employed impact fees.

Id. at 207.

6 All evidence points to the rapid spread of land development impact fees throughout the nation making it a prevalent means of funding new growth. As local governments become pressed to provide an ever-increasing list of costly services to their citizens while at the same finding their financial resources to be squeezed, impact fees will continue to be an attractive supplement for much-needed revenue. . . . Without having to face the opposition of future residents who do not currently live or vote in the locality, these officials find impact fees an irresistible policy option.

Id. at 262.

the vital real estate development sector.

This case thus raises a matter of national concern that this Court has not previously considered affecting a significant imposition on property development, utilized with increasing frequency by cash-strapped localities. This Court should therefore grant *certiorari* in this case pursuant to Supreme Court Rule 10 (b) because the decision below conflicts with decisions in other jurisdictions and pursuant to Rule 10 (c) because it raises an important question of federal law.

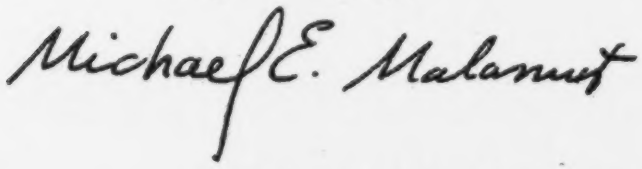
CONCLUSION

For the reasons stated above, this Court should grant Drebicks' Petition for a writ of *certiorari*.

Respectfully submitted,

NEW ENGLAND LEGAL FOUNDATION,
ATLANTIC LEGAL FOUNDATION, and
GREATER BOSTON REAL ESTATE BOARD

By its attorneys,



Michael E. Malamut, *Counsel of Record*
Martin J. Newhouse
New England Legal Foundation
150 Lincoln Street
Boston, MA 02111-2504
Telephone: (617) 695-3660
Facsimile: (617) 695-3656
michaelmalamut@nelfonline.org

Martin S. Kaufman
Atlantic Legal Foundation
150 East 42nd Street
New York, NY 10017
Telephone: (212) 573-1960
Facsimile: (212) 857-3653
mskaufman@yahoo.com

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